SECTION 3 - APPEALS

1 APPEAL TRIBUNAL HEARINGS

A. BENEFIT CASES

1. Introduction

Right to appeal. After an individual's claim for benefits is taken over the phone, a determination will be mailed to both parties (the employer and the claimant). If you disagree with the determination regarding the claimant's eligibility for unemployment benefits, you have the right to make an **appeal**, which is a written request for a hearing.

Hearing. A hearing gives the parties the chance to present their cases before an **administrative law judge** or **ALJ**, who is an attorney. The ALJ conducts the hearing and makes sure that each side has the opportunity to present evidence and give testimony.

The **ALJ's decision**, also called an **Appeal Tribunal Decision** or **ATD**, can change the ruling made in the determination. Having a hearing is like "starting from scratch," as if the determination was never made. Only evidence and testimony presented at the hearing will be considered by the ALJ.

Although the hearing is not a court trial, it *is* a formal proceeding. Witnesses are sworn to tell the truth. Statutory and common law rules of evidence are not controlling. Administrative procedural rules on burden of proof, cross-examination, and limits on the use of hearsay evidence are followed.

2. How to Appeal

a. Filing an appeal

- An appeal must be in writing. To appeal, you must write to the department stating that you are appealing a determination.
- Include a copy of the determination or identify the determination by its nine-digit number located in the upper left-hand corner of the page.
- Include the claimant's name and social security number, as well as the name of your place of employment and actual worksite address.
- Include dates and times when you and your witnesses and representatives cannot be available for a hearing. The department will attempt to accommodate your request.
- Indicate any special needs such as an interpreter or other accommodations needed due to disability.
- You, your agent, or your attorney must sign the appeal.
- The appeal should be delivered during office hours, mailed, or faxed to the hearing office listed on the back of the determination under WHERE TO FILE AN APPEAL.

Deadline. The appeal must be **post-marked or received within 14 days** of the date on which the determination was issued. The deadline is printed on the determination. The person appealing is called the **appellant**. The person responding to the appeal is called the **respondent**.

b. Late appeals

An appeal that is received or postmarked **after** the deadline specified on the determination is considered a **late appeal.** An ALJ will review the appellant's written reasons for filing late, and if those reasons, when construed most favorably to the appellant, do not constitute a reason beyond the appellant's control, the ALJ may dismiss the appeal without a hearing and issue a decision accordingly. The initial determination will remain the final disposition of the case.

Reasons beyond an appellant's control. If the ALJ does not dismiss the appeal, the hearing office will schedule a hearing to take testimony about why the appeal was late and possibly the merits of the case. The ALJ will determine if the appeal was late for a reason beyond the appellant's control. Work or personal obligations, being out of town, or misreading or misunderstanding the determination generally **are not** considered to be reasons beyond an appellant's control and the ALJ will dismiss the appeal. The determination will remain the final disposition of your case.

Hearing on the merits. If the appellant proves that the reason for the late appeal *was* beyond his or her control, the ALJ will proceed to the merits of the case or will order that a later hearing be scheduled.

3. Scheduling and Notice of Hearing

a. Scheduling a hearing date

Once a timely request for a hearing for appeal is received, a hearing is scheduled by one of the four regional UI hearing offices. (Hearing office addresses and telephone numbers may be found in Appendix A of this section.) A hearing is usually scheduled within a few weeks after an appeal has been filed.

Parties will be sent a **Notice of Hearing** at least 5 days in advance of the hearing. The Notice contains important information you will need to know about the scheduled hearing, including:

- the **time**, **date**, and **location of the hearing**
- whether the parties will appear in person or by telephone
- what issue(s) will be dealt with at the hearing

To see **sample hearing notices**, see Appendix B in this section.

Questions before the hearing. If you have questions about the issue(s) before the hearing, contact the hearing office listed on the Notice of Hearing.

Please read BOTH SIDES OF THE HEARING NOTICE CAREFULLY. Make sure you understand the specified issue or issues and prepare your case with those issues in mind.

b. Scheduling accommodations

When you file an appeal or are notified that the claimant has filed an appeal, **contact the hearing office immediately** to request scheduling accommodations if you have scheduling conflicts in the coming month, such as a pre-planned trip, convention, medical appointment, court date, etc. The **hearing office cannot promise** any specific date and time, but it **may** be able to schedule around the conflict.

However, keep in mind that **parties are expected to make the necessary arrangements** to attend the hearing, including taking time off from work or school.

Postponements of scheduled hearings are **granted *only for exceptional circumstances*** and must be requested as soon as the need for postponement becomes known.

c. Withdrawals

The appellant may withdraw the appeal at any time before a decision on the merits is issued. **A withdrawal may be by telephone or in writing** to the hearing office listed on the Notice of Hearing.

The determination, which is the last decision made by the department, will remain in effect and become final without further appeal rights.

Ensuring that a hearing occurs. A party who wants to ensure that there is a hearing in a case is advised to file his or her own appeal, even if the other party has also filed one. The hearing will not occur if the first party to file withdraws his or her appeal unless the other party also appealed in a timely fashion.

4. Attendance at the Hearing

a. Introduction

Generally, both the claimant and the employer should attend the hearing. However, an employer is not required to attend if the issue in dispute was raised by the department, such as why the claimant failed to follow required filing procedures or did not accept a valid job offer from a different employer. Contact the hearing office listed on the Notice of Hearing if you have a question about the need to attend.

Follow the instructions on your hearing notice. You must report in person if you are scheduled to appear in person. **If you are scheduled to appear by telephone, you must be available to be reached at the telephone number you provide the hearing office.**

b. Failure to appear at the hearing

Appellant fails to appear. If the appellant (whether claimant or employer) does not attend the hearing, then the appeal is dismissed. The determination, which is the last decision made by the department, remains in effect and becomes final (unless good cause for failing to appear is shown). The ALJ will wait 15 minutes before dismissing the appeal.

Respondent fails to appear. A respondent who does not attend the hearing gives up the chance to present evidence and testimony at the hearing (unless good cause for failing to appear is shown). The ALJ will wait five minutes before proceeding with the hearing without the respondent.

Good cause for failing to appear. If a party fails to appear for a hearing but believes there was good cause for failing to appear, he or she may provide a written explanation of the reasons for not appearing. Submit the written explanation to the hearing office at any time before the decision is issued and within the 21-day appeal period after the decision is mailed. The ALJ will decide whether to schedule a hearing on the nonappearance issue only, or whether to schedule a hearing on the non-appearance issue and conditionally on the merits of the case.

A new hearing on the merits of a case will be scheduled only if good cause for not appearing is established. A person's illness, an accident, or unexpected circumstances that would prevent a person from attending a hearing may be good cause. Forgetting about the hearing, writing the wrong date on your calendar,

getting lost, or getting stuck in traffic generally are not considered to be good cause.

5. Telephone Hearings

The department may conduct telephone hearings, that is, hearings in **which one or both of the parties appear by telephone**. (A hearing in which only a non-party witness appears by telephone is not considered a telephone hearing.)

The department makes the final decision on whether a hearing will be by telephone or in person. To request a telephone hearing, the appellant must ask for one in the request for appeal. Alternatively, the respondent must request a telephone hearing within five days of the date on which the **Acknowledgment of Appeal** (the notice that an appeal has been filed) was sent.

A telephone hearing will be presumed suitable when one or more of the parties is located 40 miles or more from the hearing location (which may be different than the hearing office that scheduled the hearing) or when all parties request a telephone hearing.

Considerations in deciding whether a telephone hearing is suitable include whether undue prejudice would result, whether it would allow full and effective cross-examination, the complexity of the issue(s), the expected length of the hearing, the number of witnesses, and the number and complexity of potential exhibits.

Testimony is taken and recorded over the phone; otherwise, all aspects of the hearing remain the same. There are various pros and cons to telephone hearings (For a list of things to think about before requesting a telephone hearing, see Appendix A.)

Appearing in person instead of by phone. A party or witness who is scheduled to appear by telephone may appear in person if he or she notifies the hearing office **in advance**. **A party or witness that is to be contacted by telephone must provide the hearing office with a telephone number at which he or she can be reached at the time of the hearing.** If that person is not able to be reached at the scheduled time, the appeal may be dismissed or the hearing may proceed without the person or party that was to be phoned. If you plan to have any witnesses, you should contact the hearing office so that arrangements can be made for a conference call.

Submission of exhibits for a telephone hearing. Copies of relevant documents in the hearing file are sent to the parties before the hearing is scheduled. **Any additional documents that a party wants considered by the ALJ during the hearing must be sent to the other party and the hearing office in ADVANCE of the hearing.** Documents that are not properly submitted to the hearing office and the other party may be excluded from consideration by the ALJ.

6. Preparing for the Hearing

a. General information

IMPORTANT: All appeal levels above the hearing level use the record from the hearing to make their decisions. As a result, **it is important to bring and present all relevant information at the hearing.** Since you may get only a few days notice that your hearing has been scheduled, it is *very* important to begin preparing the case right away.

A party may present his or her own case at the hearing or may have an attorney or other representative to present the case and question witnesses. If a party plans to have an attorney or representative at the hearing, that individual must contact the hearing office as soon as possible.

To attend a hearing to see what one is like, contact the hearing office.

To obtain a copy of a tape recording of a hearing, call (608) 266-3174. There is a $7.00 per tape fee.

Preparing your case. Prior to the hearing, it is helpful to prepare notes of the facts involved in the case for reference during the hearing. Parties should also write down questions for the other party and important points he or she wishes to make to the ALJ.

Because notes are used only to refresh the memory of the notetaker, no party will be allowed to read aloud from them as testimony, nor will any notes be marked as exhibits.

Reviewing your file. A party may review the UI Division file of his or her case at the hearing office listed on the "Notice of Hearing". To make sure the file is available, please call the office in advance. A party may also receive a copy of the file through the mail. Call the hearing office to request copies.

Research. Selected Appeal Tribunal Decisions (ATDs) issued in other hearings are available in a searchable database at www.dwd.state.wi.us /uibola/bola/atds/ATDsearch.htm.

Prior LIRC and court decisions on the issue in your case. Summaries of court decisions are gathered in multiple volumes of the Unemployment Compensation Digest. These are available at most public libraries, law libraries, and from the department. The Digest is also available at any of the hearing offices or at the administrative office (GEF-1 Building, 201 E. Washington Avenue, Room 331X, Madison). The 1991-94 digest may be found at LIRC's website www.dwd.state.wi.us /lirc/default.htm. A number of prior LIRC decisions may also be found at LIRC's website. You can review these as well, but keep in mind that **except in most tax cases, LIRC decisions are not precedent-setting**. (For more information on precedents in tax cases, see sec. B.10 below.)

b. Burden of proof and level of certainty required

Who has the "burden of proof" (that is, who must show that a particular thing is true) depends on the issue or issues involved in that particular case.

Remember that **there is a statutory presumption that a claimant is eligible** for benefits, **unless a specific disqualification** applies.

If a claimant has been discharged, then it is up to the employer to prove that the person is not eligible because she or he was fired for misconduct. It is the **employer's burden** to prove that the reason(s) for the discharge constitutes misconduct.

However, when someone quits a job, the general rule is that a claimant is ineligible for benefits until certain requalifying requirements are met. The **claimant then has the burden** of proving that he or she is eligible because one of the exceptions to the general quit rule applies or because he or she has met the requalification requirements.

Preponderance of the evidence. The vast majority of cases involve proof by a "preponderance of the evidence". This means that whoever has the burden of proof must show that it is more probable than not that the claim that the party is making is true. For example, if an employer is trying to prove that an employee was fired for misconduct, the employer must convince the ALJ that it is more probable than not that the claimant engaged in misconduct for which he or she was fired.

Clear and convincing evidence. If the employer claims that the person engaged in some criminal behavior (such as theft), then "clear and convincing evidence" must be provided. This level is higher than "by a preponderance" but is not as high as "beyond a reasonable doubt". It is a degree of proof that requires a firm belief or conviction in the mind of the ALJ that what you claim is correct.

c. Witnesses

Ask people who have actual personal knowledge and were present to see and hear the events or facts to which they are testifying to be witnesses.

An **affidavit or written statement (even if notarized) cannot substitute** for the **personal appearance of a witness.** The witness must be present at the hearing or appear by telephone, be sworn in, and subject to questioning by the ALJ and the other party.

Hearsay. The ALJ cannot make any findings based solely on hearsay testimony, that is, testimony not within the witness's own personal knowledge.

Example: If you want to present evidence that a worker hit another worker, you should have either the worker who was hit or an eyewitness testify. Both the worker who was hit and the eyewitness have personal, firsthand knowledge of what happened ("Joe hit me", or "I saw Joe hit him."), rather than secondhand knowledge or hearsay from a supervisor ("The worker reported to me the next day that Joe hit him.").

Repetitious testimony. The ALJ will limit repetitious testimony. If several people witnessed a particular incident, you do not have to bring them all. Choose one or two with the best information.

Relevant testimony. The ALJ will not permit testimony from witnesses that is not relevant or not material to the issue(s) involved in the case. Relevant evidence is evidence that tends to make any important fact more probable than without the evidence.

Subpoenas. If a party is unsure whether a witness will come to the hearing, he or she can require the witness to attend by obtaining a subpoena. For more information about subpoenas, see sec. A.6.f. below.

d. Exhibits

A party may wish to introduce documents or other materials such as payroll or attendance records, check stubs, letters, warnings, medical excuses, work rules, work schedules, reports, photographs, video or audio tapes, charts, objects, sample products, etc., to support a case. However, the ALJ may refuse to accept irrelevant evidence that does not make an important fact more probable than without the evidence.

Photocopies may be submitted, but the original documents should be brought to the hearing to confirm the authenticity of the photocopies. Generally, the person responsible for creating or keeping the records should be present at the hearing to identify, authenticate, and testify about them.

Supplying your own video or audio equipment. If a video or audio recording is important to prove your case, **you must supply the**

equipment to play the taped material at the hearing and submit the tape(s) as part of the record while the appeal is pending (after which it may be returned to you).

e. Medical evidence, labor market information or expert testimony and forms

When the department needs to consider medical information in making a decision, it will send out a **standard form UCB-474, "Medical Report to Determine Unemployment Insurance Eligibility"**, for completion by the claimant and his or her doctor. A copy of the completed form is generally provided to both parties before the hearing.

Medical evidence. A certified or verified report by a qualified expert is considered *prima facie* evidence, that is, evidence sufficient to establish the fact at issue unless contradicted and overcome by other evidence. Accordingly, if the doctor returns a **properly completed UCB-474**, then his or her presence at the hearing is not required.

An employer may wish to subpoena the doctor or present an alternate certified or verified report by a qualified expert (or perhaps subpoena a company doctor who examined the claimant) to rebut what the claimant's doctor has said. To see a copy of this form, see Appendix B.

Labor market evidence. In determining a claimant's availability for or ability to work, the department will request labor market information from labor market analysts employed by the state. Labor market analysts are sometimes called as witnesses at hearings. However, in most cases the labor market analysts are able to provide the necessary information on standard forms that can be considered evidence. In such cases the labor market analyst need not appear at the hearing.

A copy of the completed form may be available for review before the hearing, if time allows. If the form was not available for viewing before the hearing and your want to rebut the form, you may ask the ALJ to continue the hearing on a later date. This provides a party with the opportunity to subpoena the labor market analyst or to present other expert testimony about the information in the labor market analyst's report. To see a copy of this form, see Appendix B at the end of this section.

Drug test evidence. In cases involving drug tests, the department may send out its form for completion by the specimen collector and the drug testing laboratory. This certified or verified report is considered *prima facie* (sufficient) evidence of the drug test result, that the result was valid, and that the drug test procedures met certain standards. **A copy of the drug test report received from the lab is not sufficient.** If an employer's case involves a drug test and he or she has not received the forms, call the hearing office listed on the "Notice of Hearing" immediately. To see a copy of these forms, see Appendix B at the end of this section.

f. Subpoenas

If a witness seems reluctant to appear at the hearing voluntarily or if you wish to obtain specified documents, you may ask the hearing office to prepare a subpoena form for you. An attorney representing you may also issue a subpoena. A subpoena requires the witness to appear or requires presentation of the requested documents.

You are responsible for serving the subpoena before the hearing and for

providing the required witness fee and mileage payment to the witness. The hearing office will provide further information about serving the subpoena when giving you the form.

7. Prehearing Conferences

ALJs may schedule prehearing conferences pursuant to DWD 140.07. However, they will be used only in the most complex cases.

Following the conference, the ALJ will issue an order about such matters as stipulations about facts (both sides agreeing that certain facts are true), limitations on the number of witnesses, stipulations about evidence, and any other matters that might assist in the disposition of the appeal.

8. The Hearing

a. Accessibility

Most of the hearing locations throughout the state are accessible to persons with physical disabilities. If certain accommodations are necessary to meet your physical needs, you should contact the hearing office immediately so that arrangements can be made.

If you need an interpreter to properly present your case, you should immediately contact the hearing office.

People who are deaf, hard of hearing, or speech-impaired who use a TTY (text telephone) or PC (personal computer) to communicate can contact the hearing office by first calling the WI TRS (Wisconsin Telecommunications Relay System) at 1-800-947-3539.

b. Hearing procedure

Although all UI hearings are open to the public, it is very unusual for a person unrelated to your case to attend. A record is made of the hearing by tape recording. To make sure that a good record of the hearing is made, it is important to speak loudly and clearly, not rustle papers, and not interrupt, argue or talk at the same time as someone else.

The ALJ will introduce himself or herself, identify the people in the hearing room, explain the hearing procedures, introduce the hearing by summarizing the determination issued by the department, define the issue(s) involved in the case, and ask both parties for brief statements about their positions. The brief statement is not intended to include all the details of your case. Rather, it should provide a quick description of what you are claiming. Two examples are: "I believe the claimant quit" or "I discharged the claimant for misconduct."

The ALJ will determine the order in which the parties and any witnesses testify. Parties and witnesses will be sworn in before they testify. The ALJ is responsible for getting all the information necessary to understand the facts of your case and make a sufficient record of testimony and other evidence presented in order to make a decision in your case. Accordingly, the ALJ will question you and your witnesses.

Cross-examination. In addition to presenting his or her own testimony, a party will be given a chance to ask questions of the other party and his or her witnesses (called cross-examination). It may be helpful to bring a pen and paper to take notes during the testimony. The other party may also cross-examine you and your witnesses.

Cross-examining a witness involves asking questions about that person's testimony or getting him or her to provide additional information important to your case. It does *not* involve providing your own testimony about what happened (you will get your own chance to do that).

For example, the claimant's witness might testify that he worked with the claimant on the same shift and did not see him smoking. You can cross-examine the witness by asking questions such as "Were you with the claimant during the entire shift?" but cannot argue or rebut what he said (by saying, "The supervisor told me he was smoking on the shop floor").

Additional witnesses who have knowledge of the case **may also be called**. These may include UI Division employees, department labor market analysts, etc.

Duties of the ALJ. The ALJ is responsible for controlling the hearing, making sure that the rules of evidence are followed, and protecting the due process rights of both parties. The ALJ may order that witnesses be sequestered (remain outside the hearing room while other witnesses testify) so that the witnesses are not influenced by the testimony of other witnesses. The ALJ may limit or exclude the testimony of witnesses if the testimony is repetitive, irrelevant, immaterial, and/or based solely on hearsay. (For more information on hearsay, see sec. A.6.c. above.)

After both parties have had the chance to present evidence and witnesses, the ALJ will end the hearing.

9. After the Hearing

After the hearing, the ALJ will review the testimony and the exhibits received at the hearing, decide how the unemployment insurance law applies to the facts, and issue a written decision. The ALJ's decision will be based **solely** on what was said and the evidence presented at the hearing.

Ordinarily in a benefits case, you will be sent a copy of the ALJ's decision within **two weeks** after the hearing. **If you haven't received a benefits decision within three weeks, contact the hearing office.** This is important to avoid missing a deadline of any further appeals of your case.

Contradictory evidence. People are sometimes confused when they get a decision because it looks to them like the ALJ got the facts wrong in the decision. This confusion is usually because two different versions of what happened were presented at the hearing. Especially when the evidence is one person's testimony against another person's, deciding which version of the facts is more credible can be difficult. The ALJ will make the finding of facts as he or she has been convinced they occurred. If it looks like the decision missed some facts or states things you testified didn't happen, that ALJ probably concluded that the testimony of the other party's witness concerning that particular fact was more credible.

It is important to recognize that a decision in a benefit case DOES NOT decide your UI TAX STATUS.

Example: A benefit decision is issued stating that Ann Smith was an employee and not an independent contractor. That decision will not automatically decide that issue for the employer's UI tax purposes. The issue involved in the benefit case is not whether you are liable for UI taxes; it is whether the claimant is eligible for benefits.

10. Further Appeals

The decision of the ALJ may be appealed to the Labor and Industry Review Commission (LIRC), and LIRC's decision may be appealed to the courts. For detailed information, see Parts 2 and 3.